A QUEST FOR JUSTICE:
INVESTIGATING SEXUAL AND GENDER-BASED VIOLENCE AT THE INTERNATIONAL CRIMINAL COURT

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The International Criminal Court was heralded as a beacon of hope: an honourable institution that would end the impunity of those who have perpetrated, commanded, or contributed to the gravest crimes of concern to the international community. Yet the ICC's quest to prosecute perpetrators of war crimes and crimes against humanity has been one of significant struggle, especially in cases involving sexual and gender-based violence. The Office of the Prosecutor has been routinely criticised by the Pre-Trial and Trial Chambers for its investigative shortcomings which have included: the inadequate supervision of intermediaries; the over-reliance on third-party material as evidence; the overuse of evidence obtained through confidentiality agreements; not investigating incriminating and exonerating evidence equally; and having limited field presence of Prosecution members during investigations. Despite, for many years, falling short of international expectations in relation to sexual and gender-based violence, positive change has not been an impossible task. From the almost fatally flawed investigations in the case of Lubanga to the recent conviction of Jean-Pierre Bemba Gombo for rape as a war crime and crime against humanity, the importance of high standards and methods of evidence collection has been made very clear. Above all, incorporating a gender-perspective in investigations is paramount to ensuring the ICC will be more than a mere symbol of justice and continue on the path to delivering the results is promises under article 54(1)(b) of the Rome Statute.

I INTRODUCTION

The creation of the permanent International Criminal Court ('ICC' or 'the Court') in 2002 signalled a new era in international justice whereby the perpetrators of the most, 'unimaginable atrocities that deeply shock the conscience of humanity'[1] could be prosecuted, sending a message that humanitarian catastrophes resulting from tyrannical leadership of powerful military commanders and political figures will not go unpunished. For centuries, the continued use of sexual and gender-based violence ('SGBV') against civilians has been a prominent and pervasive feature of conflicts worldwide and historically has been under-reported and under-prosecuted.[2] The drafting of the Rome Statute of the ICC ('the Statute') made an important contribution in history by creating the first permanent international legal body to distinguish between distinct types of SGBV and to highlight their seriousness as both war crimes and crimes against humanity.[3] Accordingly, the ICC has been influential in growing and

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[1] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, A/CONF.183/9 (entered into force 1 July 2002), Preamble ('Rome Statute'). See also: William Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press, 2012) 25-46.

[2] For example, see: Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: the Importance of Human Rights as Means of Interpretation*, Office of the United Nations High Commissioner for Human Rights, 3; Kelly Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 288 *Berkeley Journal of International Law* 288-292.

[3] Statutes for the International Criminal Tribunals for Rwanda and the Former Yugoslavia included 'rape' as the only specific sexual offence that may constitute a crime against humanity or war crime. See: *Statute of the International Criminal Tribunal for Rwanda*, annexed to Resolution 955, SC Res 955, UN SCOR, 49th sess,

strengthening the international recognition of both the prevalence and gravity of SGBV in conflict.[4] While these achievements are significant, for most of the Court's existence, the office of the Prosecutor (the 'office' or 'OTP') has faced criticism for its investigative shortcomings that have resulted in a lack of charges and prosecutions of such crimes. Among other issues,[5] problems pertaining to the investigative methods of the OTP have been a source of primary concern, as the ineffective gathering of evidence severely hampers prosecutorial efforts at every stage of proceedings thereafter.

This paper examines the recent case law of the ICC and the investigative methods adopted by the OTP in relation to SGBV and questions whether the current strategies adequately allow for the admission of relevant evidence, which can lead to convictions if warranted. It will also detail the importance of including a gender perspective in investigations with particular reference to the *Katanga* and *Bemba* cases. Recommendations for reform will be presented that will hopefully ensure that the Court complies with article 54(1)(b) of the Statute which requires that, in ensuring the 'effective investigation and prosecution of crimes within the jurisdiction of the Court' the Prosecutor, 'take into account the nature of the crime, in particular where is involves sexual violence, gender violence or violence against children.'[6] First however, it is useful to trace the history of SGBV in conflict in relation to international criminal proceedings.

II CRIMES OF SEXUAL AND GENDER-BASED VIOLENCE: AN HISTORICAL OVERVIEW

A The law prior to and post-World War II

Historically, SGBV has been seen as either a natural part of every war, or at least as a crime of secondary importance to others.[7] Consequently, such conduct has also been under-investigated and under-prosecuted. Earlier warrior codes dating from the first century indicated that wartime sexual violence was not to be inflicted upon persons occupying functional societal rungs.[8] Elements of such codes were also inserted into military codes of the eighteenth century. Essentially, persons such as scholars, farmers, merchants or priests were not to be victims of the crimes which would destabilise a society.[9] These prohibitions did not validate the worth of the individual akin to any modern human rights conception, but ensured that the non-military

3453rd mtg, art 3(g) and 4(e); *Statute for the International Criminal Tribunal for the Former Yugoslavia*, annexed to Resolution 827, SC Res 827, UN SCOR, 48th sess, 3217th mtg, art 5(g).

[4] Timothy McCormack, 'Crimes Against Humanity' in: Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 179, 195-196.

[5] See, for example, divergent views relating to the characterisation and charging of SGBV crimes in the case of *Bemba*: *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [197]-[205]; *Prosecutor v Jean-Pierre Bemba Gombo (Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 31 July 2009).

[6] *Rome Statute of the International Criminal Court*, art 54(1)(b).

[7] Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: the Importance of Human Rights as Means of Interpretation*, Office of the United Nations High Commissioner for Human Rights (2008) 5.

[8] Ibid.

[9] Ibid.

segments of society remained operational.[10] As such, the destabilising and debilitating effects of SGBV on individuals and their communities were recognised long before the international criminalisation of such conduct.

Recognition of SGBV in armed conflict was only slightly advanced in the late nineteenth and early twentieth centuries. Despite its achievements in the international justice movement, the Nuremberg trials paid no attention to SGBV. While the International Military Tribunal for the Far East (the 'Tokyo Tribunal') did issue convictions for the rape of prisoners and female nurses under the 'murder, rape and other cruelties' category of war crimes, the systematic military sexual slavery of the thousands of 'comfort women' was not considered.[11] It was only with the discovery of the scale of sexual atrocities committed during the war in the former Yugoslavia that the issue of wartime sexual violence was drawn to the attention of the international community.[12]

The landmark case of *Prosecutor v Tadic*[13] in the International Criminal Tribunal for the former Yugoslavia ('ICTY') was the first international criminal trial to prosecute sexual violence as a war crime. In 1997 Dusko Tadic was convicted of 'cruel treatment' (violations of the laws and customs of war) and 'inhumane acts' (crimes against humanity) for ordering crimes of sexual violence in a camp run by Serb forces. The case of *Prosecutor v Kunarac*[14] was also significant as it was the first case to recognise the crime of sexual slavery by convicting eight Bosnian Serb soldiers for the enslavement and rape and torture of Muslim women in the Bosnian town of Foca during 1992 and 1993. The International Criminal Tribunal for Rwanda ('ICTR') has also played a significant role in the international community for the prosecution of SGBV. The decision of *Prosecutor v Akayesu*[15] was the first to convict perpetrators of sexual violence against women in the Rwandan genocide. Additionally, the jurisprudence of the Special Court for Sierra Leone ('SCSL') indicates both the growing awareness of SGBV in conflict and the necessity of prosecutions.[16] A trial judgment by the SCSL relating to offences by the Revolutionary United Front between 1991 and 2002 brought the first ever conviction for the crime of sexual slavery and forced marriage as inhumane acts.[17] Beyond the jurisprudence of the ad hoc tribunals, the Rome Statute goes a long way to recognising the variety of forms of SGBV and their seriousness as international crimes.

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[10] Patricia Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds) *Substantive and Procedural Aspects of International Criminal Law*, (Dordrecht: Nijhoff, 2000) 289-291.

[11] See generally: 'Comfort Women Judgment,' 4 December 2001, Women's Caucus for Gender Justice, <www.iccwomen.org/archive/tokyo/summary.htm>

[12] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Sweet and Maxwell, 2003) 346-347.

[13] *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-94-1, Oct. 2, 1995).

[14] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001).

[15] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)* (International Criminal Tribunal for Rwanda, Case No ICTR-96-4-T, 2 September 1998).

[16] For a general overview of the development of the SCSL see: Geoffrey Robertson, *Crimes Against Humanity* (Penguin Publishing, 2007) 503-510. For an analytical overview of the gender jurisprudence of the SCSL see: Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 *Cornell International Law Journal* 49-74.

[17] *Prosecutor v Sesay, Kallon and Gbao*, (*Corrected Amended Consolidated Indictment*) (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-PT, 26 October, 2009).

B Crimes of sexual and gender-based violence under the Rome Statute

On 17 July 1998 in Rome, 120 nations adopted the Statute to create the ICC.[18] The product was the Rome Statute which extends jurisdiction to four offences: genocide,[19] crimes against humanity,[20] war crimes[21] and the crime of aggression[22] and only crimes committed after this date can be prosecuted.[23] The negotiations for the ICC became an historic opportunity to address the failures of earlier international treaties and tribunals to properly identify, investigate and prosecute sexual crimes and the end result was the incorporation of a variety of sexual and gender-based violence as both crimes against humanity under article 7 and war crimes under article 8.

Article 7(1)(g) identifies 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as a crime against humanity. Importantly, for the purpose of the Statute, article 7(3) states that it is understood that the term 'gender' refers to the two sexes, male and female. In article 8(1) it is stipulated that, 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' For the purposes of the Statute, a war crime is any grave breach of the Geneva Conventions of 12 August 1949, the individual elements of which are set out under article 8(2)(a)(i)-(viii). Article 8(2)(b) expands on the crimes established in 8(2)(a) by including 'other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law' and article 8(2)(b)(xxii) outlines the crime of 'committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.' In the case of an armed conflict not of an international character, the same conduct is punishable under the Statute and includes any other form of sexual violence also constituting a serious violation of article 3, common to the four Geneva Conventions.

While the drafting of these provisions were certainly historic achievements, at the time they were implemented, the Court was yet to face the challenge of undertaking effective investigations and prosecuting the recognised crimes.

[18] It is worth noting that despite widespread support for the Court, there is currently armed conflict in many signatory States which have not ratified the Rome Statute and three signatories – Israel, Sudan and the United States – who have subsequently declared that they no longer intend to ratify the treaty. Forty-two other countries, including China, India, Indonesia, North Korea, Libya, Pakistan, Papua New Guinea and Saudi Arabia have neither signed nor ratified the treaty. See: UN Treaty Series, *Rome Statute of the International Criminal Court*, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774>.

[19] *Rome Statute of the International Criminal Court,* article 6.

[20] Ibid, article 7.

[21] Ibid, article 8.

[22] Ibid, article 9. For a general overview of the Rome Conference see: Geoffrey Robertson, *Crimes Against Humanity* (3rd edition, Penguin Books Australia, 2008) 419-467.

[23] *Rome Statute of the International Criminal Court*, article 24. This is the principle of *non-retroactivity ratione personae* – 'that no person shall be criminally responsible under [the] Statute for conduct prior to the entry into force of the Statute.'

III INVESTIGATING SEXUAL AND GENDER-BASED VIOLENCE AT THE INTERNATIONAL CRIMINAL COURT: EVIDENTIARY ISSUES AND IMPACTS

A Obstacles to effective international criminal investigations

International criminal investigations give rise to a variety of obstacles that are as unique as they are complex.[24] From the outset, the sheer physical distance between proceedings in The Hague and the location of where crimes are alleged to have been committed presents a significant challenge. Even locating a crime scene can prove troublesome, as they are often established years after the alleged crimes have taken place. Most steps in the investigative process are made difficult due to the 'Achilles heel' of the ICC: an absence of any police force.[25] Further, the political aspects of international criminal justice also come into play when the ICC is faced with the issue of uncooperative States, particularly when political figures remaining in power are investigated.[26]

The gathering and questioning of witnesses has also proved time-consuming and difficult, whether that is in locating witnesses or gathering testimony and verifying their credibility. Language and cultural barriers create additional hurdles as evidence almost always needs to be translated from local languages into English and French.[27] Above all, security risks have presented the most significant problem in international criminal investigations and have underpinned many of the other issues the Court faces in obtaining convictions or, at the very least, running a case that does not provoke unimpressive assessments of the OTP's practices by Pre-trial and Trial Chambers.

Areas where the 'gravest crimes of concern' have occurred continue to be plagued by violence, instability and uncertainty. It is no surprise that this has been an issue in many of the cases the ICC has heard since 2002. In the first completed case at the ICC, *The Prosecutor v Thomas Lubanga Dyilo*[28] ('*Lubanga'*) the Trial Chamber detailed, in considerable length, the security risks that adversely affected the investigations. One investigator told the Court that armed groups were still operating on the outskirts of the area they were investigating. This made the process quite dangerous and, despite assistance from the United Nations Organisational Mission to the Democratic Republic of the Congo ('MONUSCO'), it was still extremely

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[24] Prosecutors at other international criminal tribunals have pointed out how different an international criminal investigation is from a standard domestic investigation: see generally Mark Harmon and Feargal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2(2) *Journal of International Criminal Justice* 403-426.

[25] See for example: Han-Ru Zhou, 'The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC' (2006) 4 *Journal of International Criminal Justice* 202-218, 203.

[26] For example, see the ICC's difficulty in getting Sudanese President Omar Al Bashir to surrender to the ICC: two arrest warrants were issued, but he travelled far and wide to diplomatic events and States did not surrender him: Owen Bowcott, 'Sudan president Omar al-Bashir leaves South Africa as court considers arrest' *The Guardian* (online), 16 June 2015 < https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan>; Lizabeth Paulat, 'Uganda Defies ICC, Bashir Arrest Warrant' VOA News (online), 13 May 2016 < http://www.voanews.com/a/uganda-defies-icc-bashir-arrest-warrant/3328987.html> ; *Prosecutor v Omar Hassan Ahmad Al Bashir (Second Decision on the Prosecution's Application for a Warrant of Arrest)* (International Criminal Court, Pre Trial Chamber 1, Case No ICC-02/05-01/09-94, 12 July 2010).

[27] This was highlighted in the *Akayesu* case in the ICTR which faced difficulties in translating the oral testimony of witnesses from native languages into French and then English: John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence* (Cambridge University Press) 113.

[28] *Prosecutor v Thomas Lubanga Dyilo (Judgment Pursuant to Article 74 of the Statute*) Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [155] ('*Lubanga'*).

difficult to meet with witnesses safely.[29] Further the widely held assumption by locals that any foreigners in the area were employees of the ICC made, 'operating in an open way impossible and forced the investigators to do everything possible to hide the fact that they were conducting an investigation.'[30] Such risks of association and recognition hampered investigative efforts, as it made many investigators reluctant to follow up and gather corroborative evidence, believing 'all witnesses were at risk.'[31] One investigator explained this risk by testifying that being noticed would risk, 'immediate abduction of the witnesses or victims by political or military leaders still active in the area.'[32] The only perceived way to circumvent this risk was to make use of intermediaries to go between the team and the witnesses to gather information.[33]

Security concerns are problematic for both the prosecution and defence. This was evident in the case of *Prosecutor v Germain Katanga*[34], which also arose out of the Situation in the Democratic Republic of the Congo. This case centred on a militia attack on the rural town of Bogoro in 2003 where members from the Nationalist and Integrationist Front (FNI) and the Front for Patriotic Resistance of Ituri (FRPI) went on an 'indiscriminate killing spree' killing at least 200 civilians, imprisoning survivors in a room filled with corpses and sexually enslaving women and girls. Matters of security became particularly pertinent when the judges of Trial Chamber II made the controversial decision to implement Regulation 55 to re-characterise some facts of the case and change the mode of liability under which Katanga had been initially charged, from an indirect co-perpetrator to an accessory of war crimes and crimes against humanity under article 23(1)(d) of the Statute. Whenever Regulation 55 is invoked, notice must be given to the other party to amend their case. In *Katanga*, the re-characterisation of the facts meant that the defence team needed to conduct further investigations, but claimed they were given insufficient notice given the prevailing security concerns in Eastern DRC. While these issues are difficult in themselves, they are exacerbated by the investigative challenges unique to crimes of sexual and gender-based violence in conflict.

B Evidence collection and admissibility: collaboration with third parties

'We must establish incredible events by credible evidence'
Justice Robert H. Jackson, Chief Prosecutor at the Nuremberg Trial

The significant rise in international legal institutions has corresponded with the worldwide proliferation of NGOs and International Organisations (IOs).[35] As such, the involvement of

[29] Ibid.
[30] Ibid [154].
[31] Ibid [156].
[32] Ibid [160]-[161].
[33] Ibid [167].
[34] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision Requesting Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing)* (International Criminal Court, Case No ICC-01/04-01/07, 2 June 2008).
[35] For an overview of NGOs in international law see generally: Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005).

NGOs in the treaty-making process has strengthened the rise of governance by global civil society in the international legal arena.[36] In particular, NGOs played an extremely important role in the establishment of the ICC, the drafting of the Rome Statute and the Rules of Procedure and Evidence. Beyond this, various NGOs continue to be actors on the international legal stage by investigating crimes, gathering evidence and making submissions to the Court as *amicus curiae*.[37] NGOs such as Human Rights Watch, Amnesty International and IOs such as the United Nations provide the ICC with valuable access to witnesses and other information that the OTP might not be able to obtain independently due to limited resources. So far, the OTP has relied heavily on evidence obtained by such third parties as a way to cope with the demands of its investigations and work within the limits of its focused investigation strategy.[38]

Generally speaking, when NGOs investigate crimes, whether in collaboration with the ICC or not, investigations have multiple purposes. Human rights organisations aim to publicise atrocities, educate the public and press for a political response though, in addition to this, they work to prompt and direct prosecutions in international and national courts. For this reason, it is important that the ICC has appropriate oversight mechanisms to ensure evidence is collected and presented in an impartial manner. [39]

For SGBV in particular, the Women's Initiatives for Gender Justice is an NGO that has played a pivotal role in bringing these crimes to the attention of the Court. The Women's Initiatives was the first NGO to file before the ICC and to date has been the only human rights NGO specialising in women's rights to have been recognised as having the status of an *amicus curiae* in matters relating to sexual violence before the ICC.[40] The organisation has submitted legal filings to the ICC on six occasions, and has been recognised as *amicus curiae* in the *Bemba* and *Lubanga* cases.[41]

Overall, reliance on third party material has taken two main forms: the admission of documents created by NGOs as evidence, and using representatives from organisations to act as intermediaries between victims and the OTP to gather witness testimony and other evidence. Intermediaries are those organisations and individuals who are situated in the field and who can liaise between affected communities and the ICC. Occasionally, using intermediaries can create difficulties, as occurred in the *Lubanga* case.

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[36] Kal Raustiala, 'Institutional Proliferation and the International Legal Order' in, Jeffrey Dunoff and Mark Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 293-320.

[37] For example, the Women's Initiatives for Gender Justice regularly make submissions on matters related to gender-justice to the ICC. See: Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court, available at < http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf >.

[38] Elena Baylis, 'Outsourcing Investigations' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 121, 135. A focused investigation is one undertaken through identifying a predetermined set of incidents and suspects in a particular time frame at the beginning of the investigation rather than adopting a wider and more comprehensive exploration of the situation.

[39] Niamh Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' in: William Schabas, William, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing, 2013), 7-43, 28.

[40] Women's Initiatives for Gender Justice, *Gender Report Card on the ICC 2012* (2012) i.

[41] Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court, available at: <http://www.iccwmoen.org/publications/articles/docs/Legal_Filings_submitted_by_the_WIGJ_to_the_International_Criminal_Court_2nd_ed.pdf>.

1 The use of intermediaries to obtain evidence: lessons from *Lubanga*

The case of *Lubanga* was significant. Ten years after the creation of the ICC, Thomas Lubanga Dyilo was the first person to be convicted under the Rome Statute. As one of the founding members of the Patriotic Force for the Liberation of the Congo ('FPLC') he was convicted as a co-perpetrator of the war crime of using and enlisting children under the age of 15 to participate actively in hostilities, under Article 8(2)(e)(vii) of the Rome Statute.

In the *Lubanga* case, intermediaries played a significant role in helping the OTP to contact witnesses and in general, assisted in the development of the investigation in the Ituri region. This was made evident by the fact that roughly half of those who provided witness testimonies were contacted by the seven intermediaries the OTP used in the case.[42] However, the use of intermediaries, while useful in some circumstances, have posed significant issues in the administration of justice and have resulted in significant delays in proceedings.

Throughout the *Lubanga* case, concerns relating to the investigation and use of intermediaries presented significant evidentiary issues. At the beginning, a five-month delay occurred due to the OTP failing to disclose material which was obtained through an intermediary and which included evidence that was potentially exculpatory, to the Defence.[43] A further three-month delay occurred when claims arose that one particular intermediary was involved in witness tampering.[44] The use of intermediaries became so problematic in *Lubanga* that the Chamber had to issue a separate judgment on the admissibility of intermediaries' evidence. The judgment was in response to the finding that some intermediaries had actually instructed witnesses to provide testimony that was not entirely accurate which resulted in a withdrawal of the evidence.[45] These issues caused the proceedings to be drawn out by the Defence which unsuccessfully sought a permanent stay of proceedings on the grounds of abuse of process.[46] For all of the efforts of the OTP, only one of the witnesses connected with these intermediaries was deemed reliable by the judges with Intermediaries 143 and 321 deemed to have, 'persuaded, encouraged or assisted witnesses to give false evidence.'[47]

Working with intermediaries in the field is a vital component of international criminal investigations. The considerable obstacles to such investigations highlight their importance, namely, the lack of any ICC police force, limited resources and logistical difficulties. Just as intermediaries can aid an investigation and provide important evidence to the Prosecution, not verifying such evidence amounts to a failure of the OTP, and this is something the office should be aware of. Further, the importance of effective oversight mechanisms needs to be emphasised, as one investigator has testified that instructions and requests from the OTP were,

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[42] *Prosecutor v Thomas Lubanga Dyilo (Redacted Decision on Intermediaries)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2434-Red2, 31 May 2010) [2].

[43] Article 54(3)(e) of the Statute allows the Prosecution to 'agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.'

[44] *Prosecutor v Lubanga* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2434-Red2, 31 May 2010) [2].

[45] Ibid [7].

[46] For more information regarding the Defence abuse of process claim, see: *Prosecutor v Thomas Lubanga Dyilo (Defence Application Seeking a Permanent Stay of the Proceedings)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2657-tENG-Red, 11 August 2011); Women's Initiatives for Gender Justice, *Gender Report Card 2010*, 139-159 and Women's Initiatives for Gender Justice, *Gender Report Card 2011*, 214-221.

[47] *Lubanga* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [291].

at times, not consistent with other requests. In essence, there were no clear objectives given to investigators and this impacted proceedings in a profoundly negative way.[48] It is also noted that while problems with intermediaries affect many different facets of proceedings, such problems make investigating, charging and prosecuting cases of SGBV even more difficult, given the inherently challenging nature of the crimes themselves.

Nevertheless, it is argued that intermediaries (often working for NGOs and IOs) generally comprise a highly suitable group to conduct investigations. This is because they are usually the first ones in areas where atrocities have occurred and so, naturally, they are well positioned to collect evidence. The important thing for the OTP to keep in mind is to ensure their effective monitoring, to provide clear instructions on what is required from them when providing information to the ICC and to corroborate the evidence they obtain.

2 Confidentiality agreements and the duty of disclosure

One important aspect of the ICC system, which is also fraught with difficulty, is the duty to disclose evidence in proceedings.[49] As earlier mentioned, in *Lubanga* the Court was highly critical of the Prosecutor's reluctance to disclose potentially exculpatory material to the Defence, as required by the Rome Statute. A large portion of the evidence collected and subsequently withheld by the OTP was obtained through agreements with third parties such as NGOs and IOs. The agreements were subject to a confidentiality clause which is consistent with article 54(3)(e) of the Statute. This article essentially means that:

> In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceeding. The restrictions are that the prosecution should receive documents or information on a confidential basis **solely** for the purpose of generating new evidence – in other words, the only purpose of receiving this material should be that it is to lead to other evidence.[50]

Under the Prosecutor, Luis Moreno-Ocampo, this article was given broad application. However, it should have been applied in 'limted circumstances.'[51] One of the main purposes for Moreno-Ocampo's application of this part of the Statute was to collate 'spring board' evidence together with lead evidence. This did not impress the judges of the Pre-Trial or Trial Chambers, or Counsel for the Defence.[52]

[48] Ibid [144].

[49] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) rules 76-84; *Rome Statute for the International Criminal Court*, art 67(2).

[50] *Prosecutor v Thomas Lubanga Dyilo* (*Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1401, 13 June 2008) [71]; For a thorough examination of this rule see generally: Rachel Kaztman 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defence System Affects the Accused's Right to a Fair Trial' (2009) 8(1) *Northwestern Journal of International Human Rights* 77-101.

[51] *Prosecutor v Lubanga* (*Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e))* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1401, 13 June 2008) [76].

[52] This practice has also created fair trial rights issues as well where UN documents that were obtained under confidentiality agreements with third parties but which contained potentially exculpatory material pertaining to commanders' mental health were consequently unable to be used by the Defence. See: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision Requesting Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing)* (International Criminal Court, Case No ICC-01/04-01/07, 2 June 2008) [9]-[11].

This issue also arose in the *Katanga* case where the Prosecutor was criticised by Judge Steiner (similar to criticisms raised in *Lubanga*) saying:

> At the outset, the Single Judge notes the considerable number of documents (1632 according to the last indication given by the Prosecution on 25 April 2008) that the Prosecution has collected pursuant to article 54(3)(e) of the Statute, and that, according to the Prosecution, 'were considered to be relevant' for the present case. In the view of the Single Judge, this is particularly notable because the present case is confined to the crimes allegedly committed during one attack against one village on a single day.
>
> The Single Judge finds this considerable number of documents to indicate that the Prosecution is not resorting to article 54(3)(e) of the Statute only in exceptional or limited circumstances, but rather is extensively gathering documents under such provision.
>
> This practice, in the view of the Single Judge, is at the root of the problems that have arisen in the present case, as well as in the case of the *Prosecutor v Thomas Lubanga Dyilo*, with regard to the disclosure to the Defence.[53]

This is another example of where the rules and regulations of the Court, while fair in principle, can be easily interpreted and manipulated by the Prosecution to suit the needs of the case to the extent where it impinges on the rights of the accused. Even when confidentiality agreements are not utilised in the context of relations with third parties, documentary evidence from such bodies still raises many questions about the admissibility of hearsay.

3 Admissibility of documentary evidence from NGOs and other agencies: an examination of the hearsay rule

In the common law system, hearsay refers to an out of court assertion brought in to test the truth of the matter asserted.[54] The rule against hearsay has been defined as, 'a statement other than one made by a person while giving oral evidence in the proceedings [is] inadmissible as evidence of any fact stated.'[55] There are three main reasons why hearsay is generally excluded in common law jurisdictions and deemed unreliable in an international criminal context. First, hearsay is not considered to be the best evidence compared to original evidence usually by way of witness testimony. Second, the primary evidence is not given on oath and third, the reliability of a primary witness cannot be assessed through observation of the witness' demeanour in court. While the easy way to circumvent this is to bring in the person who made the assertion, this is made difficult when the Prosecution attempts to admit second-hand hearsay presented in the form of research documents provided by third parties.

At the ICC, there is no rule or regulation prohibiting the admissibility of hearsay evidence so long as it is relevant, reliable, and of probative value that does not outweigh its prejudicial effect.[56] Despite this, challenges to the admissibility of NGO documents on the basis that they are hearsay and therefore unreliable, or carry very little weight, has been a consistent theme in

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[53] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision Requesting Observations Concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing)* (International Criminal Court, Case No ICC-01/04-01/07, 2 June 2008) [9-11]. This point was also highlighted in: Niamh Hayes, above n 39, 12-13.
[54] *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2013) 360.
[55] *Cross on Evidence* (Butterworths, 11th ed, 2007) 588.
[56] *Rome Statute of the International Criminal Court,* art 69(3).

the cases the ICC has adjudicated. At the Court, documents or reports prepared by NGOs and UN bodies,[57] which are forms of hearsay, have been admitted as evidence in every major case, because there is no rule against it. The major issue which presents itself when admitting hearsay evidence is the prejudicial effect it has on the rights of the accused.[58] This arises in light of the fact that, as Murphy puts it, 'the repetition of any statement involves the inherent risk of error or distortion, which increases in proportion to the number of repetitions and the complexity of the statement.'[59] Arguably a more serious issue is that the defence has no means by which to challenge the truth of the evidence when the source is either protected or unable to be found.

In the case of *Mbarushimana*, the Pre-Trial Chamber accepted that war crimes and crimes against humanity had been committed in the region, but could not confirm the charges against the accused by virtue of the fact that evidence from NGOs and other organisations, while relevant, holds little weight and therefore needs to be supported with other evidence such as direct witness testimony.[60] The Pre-Trial Chamber in *Gbagbo* also faced the same issues as the OTP presented extensive evidence from Human Rights Watch to prove the existence of sexual violence.[61] Instead of declining to confirm the charges in *Gbagbo*, the Court instead adjourned proceedings to allow the Prosecutor to obtain further evidence to support the case.[62]

These two cases demonstrate that NGOs do play an important role in gathering evidence, but their usefulness is arguably limited to establishing the broader context of the crimes, rather than linking an alleged perpetrator to the crime, because to obtain a conviction of an international criminal charge of any kind, the Prosecutor must prove not only which specific acts were committed by the accused, but also a large number of facts concerning the context in which the conduct of the accused took place. The volume of contextual evidence required is extensive, particularly given that judges of international criminal trials are not generally familiar with the social, historical and political framework in which the crimes were committed.[63] It is therefore argued that the OTP needs to avoid an over-reliance on third party material as NGOs and IOs cannot carry the weight of an ICC investigation – they can certainly aid but should not lead.

As such, evidence relating to the contextual background of situations would generally be considered relevant at an international level, while at a national level it would be, 'declared irrelevant because of its superfluity.'[64] It is suggested that in such a context it would not be fair to enforce a ban on second-hand hearsay, but that evidence should be admitted with caution as it offers less probative value. As problems of this kind have now occurred in a number of cases, it is likewise imperative that the OTP takes heed and provides evidence, even at the Pre-Trial stage, that does not indicate an over-reliance on such material.

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[57] UN bodies are protected under Rule 82 of the ICC's *Rules of Procedure and Evidence*.
[58] Peter Murphy, 'No Free Lunch, No Free Proof' (2010) 8(2) *Journal of International Criminal Justice* 539-573, 540; 560-562.
[59] Ibid, 559.
[60] *Prosecutor v Callixte Mbarushimana (Decision on the confirmation of charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10-465-Red, 16 December 2011) [75]-[78].
[61] *Prosecutor v Laurent Gbagbo (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-432, 3 June 2013) [35].
[62] Ibid [47].
[63] John D Jackson and Sarah J Summers, above n 28 114.
[64] Michele Caianiello, 'First Decisions on the Admission of Evidence at ICC Trials: a Blending of Accusatorial and Inquisitorial Models?' (2011) 9 *Journal of International Criminal Justice* 385-409, 404.

C Incorporating a gender-perspective for an effective investigation

The importance of addressing SGBV at the ICC is now well accepted and the Prosecutor herself has said, '[t]he suffering of girls in armed conflicts all over the world is an urgent issue and a top priority for me as ICC Prosecutor.'[65] The challenge lies in implementation. Notwithstanding the serious and systematic underreporting of sexual and gender-based violence mentioned earlier, the OTP has indicated that prioritisation of these crimes is important. One main goal of the OTP's Strategic Plan is to, 'enhance the integration of a gender perspective in all areas of [its] work and continue to pay particular attention to sexual and gender-based crimes and crimes against children.'[66] Above all, it is necessary that the investigations are properly planned and executed to incorporate the wide range of sexual crimes that occur in conflict situations.

Since the appointment of Fatou Bensouda as Prosecutor, two documents have been produced which have garnered attention and are relevant to addressing SGBV. The first is the OTP's Strategic Plan 2016-2018.[67] The Strategic Plan outlines a variety of ways in which the Court seeks to improve its investigative practices and ensure that perpetrators are brought to justice in an expeditious manner while the rights and safety of victims and witnesses are maintained. In particular, one of the OTP's major themes of this plan is to '…integrate a gender perspective in all areas of the Office's work and to implement the policies in relation to sexual and gender-based crimes and crimes against children.'[68]

The second development is the ICC's Policy Paper on Sexual and Gender-Based Crimes ('SGBV Paper') Part V of which is dedicated to investigations, emphasising that the Prosecutor shall investigate both incriminating and exonerating evidence equally in relation to SGBV. Noting that the investigation of SGBV presents its own specific challenges, the OTP has also promised to consider specific means to address them, such as 'prioritisation from the earliest stages',[69] as well as by using a greater variety of evidence collection strategies such as: forensic, technological and documentary along with analysis techniques using database design, statistics and GIS which will assist in identifying patterns of crime. In contrast to the *Lubanga* case, the OTP in the SGBV Paper has vowed to ensure the inclusion of charges for sexual and gender-based crimes, wherever there is sufficient evidence.[70]

It is suggested that these steps indicate that the ICC is heading in the right direction, but they are not necessarily novel and, particularly in relation to SGBV, many of the promises made are simply declarations of what should have been standard procedure since 2002. Similar to the

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[65] International Criminal Court Office of the Prosecutor, *Statement ICC Prosecutor Fatou Bensouda on International Day of the Girl*, 11 October 2012 <https://www.icc-cpi.int/Pages/item.aspx?name=otpstatement111012>.

[66] '"Gender perspective" requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions': International Criminal Court Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, < https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> 3.

[67] The first version of which was for 2012-2015 and included the same gender-related provisions as the second: International Criminal Court Office of the Prosecutor, *Strategic Plan 2012-2015*, 11 October 2013 < https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> 27.

[68] International Criminal Court Office of the Prosecutor, *Strategic Plan 2016-2018*, 5 July 2015 < https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf> 6.

[69] International Criminal Court Officer of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, above n 66, 5-6.

[70] Ibid 6 [7].

Strategic Plan, the paper on SGBV indicates that the OTP will 'apply lessons learned and best practice standards to ensure the effectiveness of investigations into [SGBV].' Above all, the main message that comes out of the jurisprudence of the Court and emphasised in these documents is the importance of enhancing a gender perspective in investigations from the beginning.[71]

The importance of incorporating a view to include SGBV at the beginning of the investigation was demonstrated in the *Lubanga* case. In the opening of the trial, Moreno-Ocampo spoke at some length about the rape of female child soldiers, their sexual enslavement and abuse as 'wives' and 'sexual prey'[72] and yet, specific charges related to such conduct were not included at the beginning of the proceedings. And yet at least 15 of the first 25 prosecution witnesses (including two expert witnesses) provided testimony of sexual crimes, particularly rape and sexual slavery.[73]

The Prosecution in *Lubanga* sabotaged its chances of successfully having SGBV considered by the Trial Chamber who reasoned that, 'because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its [judgment] on the evidence introduced during the trial.'[74] It seems clear from the jurisprudence of the Court that while the Rome Statute incorporates a variety of sexual crimes and the Rules of Evidence and Procedure effectively allow for the admission of relevant and reliable evidence while also safeguarding the rights of the accused, the issues which arise in the admission of evidence relate to the mistakes and significant investigative shortcomings of the OTP. When a gender-perspective is incorporated in the investigation stage, cases of SGBV can be effectively heard at the ICC. This was made particularly evident in the cases of *Katanga* and *Bemba*.

The case of *Katanga* was the first to include charges of rape and sexual slavery and the second trial to arise out of the Situation of the Democratic Republic of the Congo. The case centred around an attack launched on the village of Bogoro in the Ituri region on 24 February 2003 which resulted in widespread death and injury at the hands of Ngiti combatants from the Walendu-Bindi tribe and Lendu combatants from the Bedu-Ezekere tribes respectively.[75] Katanga was initially jointly charged alongside Matthiew Ngudjolo Chui but the charges were severed and their cases were heard separately.[76] While Ngudjolo Chui was acquitted,[77] Katanga was convicted as an accessory under article 25(3)(d) of the Rome Statute for attacking a civilian population, destruction of property, pillaging and murder both as a war crime and crime against

[71] International Criminal Court Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, above n 66, 25.
[72] *Prosecutor v Thomas Lubanga Dyilo (Transcript)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 26 January 2009) [11]-[13].
[73] Women's Initiatives for Gender Justice, *Gender Report Card on the ICC 2009, 71-85*
[74] *Lubanga* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [630].
[75] *Prosecutor v Germain Katanga (Judgment pursuant to article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [722]-[755].
[76] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3319-tENG/FRA, 17 December 2012).
[77] *Prosecutor v Matheiu Ngudjolo Chui (Judgment pursuant to article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12-3-tENG, 12 April 2013) 197.

humanity.[78] He was acquitted of rape, sexual slavery and of using child soldiers.[79] Despite the acquittal of SGBV, the Trial Chamber did find that during the attack on Bogoro, Ngiti combatants from militia camps committed rape as war crimes and crimes against humanity, and that in the aftermath of the attack, these combatants, as well as others in the camps, committed sexual slavery as war crimes and crimes against humanity.[80] It has been argued that the *Katanga* judgment indicates a 'perhaps subconscious but clear bias requiring sexual violence to be a more explicit component of a common plan' and notes the jurisprudence of the Court has shown 'that the scale and volume of sexual violence may be rendered invisible by an incomplete assessment of the evidence.'[81]

As the first conviction for SGBV at the ICC, the *Bemba* case is a historic one. It demonstrates the impact an effective investigation can have, especially when due attention is paid to SGBV at the beginning of a case. This case indicates that taking the broad approach to charging crimes of SGBV during investigation and arrest warrant stages is far more effective than trying to add in charges of SGBV later in proceedings, or treating sexual violence as something to be considered at the sentencing stage or for reparations. One year after the *Katanga* judgment, in March 2016, the ICC unanimously convicted Bemba as a military commander for two counts of crimes against humanity including murder and rape and three counts of war crimes including murder, rape and pillaging. These cases highlight a number of lessons on the effectiveness of international criminal investigations, discussed in further detail next.

IV IMPROVING INVESTIGATIONS

A Lessons and criticisms from the Pre-Trial and Trial Chambers

Upon confirmation in 2012 that Fatou Bensouda would take the reigns of the OTP as Prosecutor of the ICC, a feature of her appointment became her support for victims of SGBV and her commitment to ensuring that perpetrators will be brought to justice.[82] In contrast to Bensouda's predecessor, Luis Moreno-Ocampo, who was criticised for his decision not to bring charges of SGBV in the *Lubanga* case, this change seemed a hopeful indication of where the future of the Court was headed. While Bensouda has been successful in bringing charges of SGBV in a number of cases, the evidence in all but one has not been strong enough to establish culpability. That said, the conviction of Bemba for SGBV is significant and has proven that the OTP is serious about not treating such crimes as less important than others.

The Chambers have expressed that its judges are mindful that investigations are generally conducted in regions plagued by high levels of insecurity.[83] Judges have also acknowledged the difficulties in locating witnesses who are both reliable and in a position to testify without

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[78] *Prosecutor v Germain Katanga (Judgment pursuant to article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) 658-659.
[79] Ibid 659.
[80] Ibid [999].
[81] Brigid Inder, 'Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned. A critique of the Katanga Judgment' (Speech delivered at the Global Summit to End Sexual Violence in Conflict, 11 June 2014) < http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>.
[82] Justice for All? International Criminal Court Ten Year Review Conference (12-14 February 2012, University of New South Wales, Sydney, New South Wales) Bensouda spoke as Prosecutor-elect; ABC Radio National Law Report, 'International Criminal Court' (14 February 2012) < http://www.abc.net.au/radionational/programs/lawreport/international-criminal-court/3829794#transcript>.
[83] *The Prosecutor v Mathieu Ngudjolo Chui (Judgment pursuant to article 74 of the Statute*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012) [115].

considerable fear. These issues are often exacerbated by the absence of strong domestic legal institutions and police forces and a lack of archives and publicly available information.[84] Notwithstanding this, judges have not been shy in expressing their disapproval in the conduct of the OTP at the investigation stage and after. This was made abundantly clear also in the *Ngudjolo Chui* and *Katanga* judgments.

At the beginning of the *Katanga* decision is a summary of multiple ways in which the OTP could have conducted a more accurate and comprehensive investigation, which would have aided their case in every step from that initial stage onwards. Essentially, the OTP were reprimanded for: not calling key witnesses to testify; not actually visiting some key locations in the investigation; not having provided sufficient background information on certain prosecution witnesses which had an impact on their credibility; and more generally, not providing the Chamber with information that would have allowed it to get a clearer understanding of the situation.[85]

In the *Ngudjolo Chui* judgment, the Trial Chamber noted that the OTP's investigative documents were obtained two years after the investigation opened in 2004 and three years after the attack of Bogoro itself.[86] This was problematic as testimonies need to be obtained in close proximity to the actual date of the alleged offences; likewise with making factual findings as close as possible to the date of the events. In this case, the absence of such evidence[87] meant it was necessary to rely primarily on witness statements and reports by MONUC investigators or representatives of various NGOs.[88] Similar to the *Katanga* case, the Chamber considered that it would have been beneficial for the OTP to actually visit the areas where the accused lived and where the preparations of the attack of Bogoro allegedly took place, prior to the substantive hearings.[89]

The OTP has also been criticised for not calling essential witnesses so that the Chamber could hear the testimonies of commanders who played a key role before the attack, during the fighting and following the cessation of the conflict. The Chamber noted that the discretion to call various witnesses rested above all with the OTP.[90] The Trial Chamber provided a further criticism regarding the OTP's failure in both the *Ngudjolo Chui* and *Katanga* cases for failing to take a statement of either accused during the investigation stage. Mathieu Ngudjolo Chui opted to testify as a witness at the end of the trial.

One major problem that has appeared regarding the prosecution of SGBV is that, in practice, the OTP does not seem to have taken on board the advice of ICC judges. On the charges for

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[84] *Prosecutor v Mathieu Ngudjolo Chui (Judgment pursuant to article 74 of the Statute*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012) [115].
[85] *Prosecutor v Germain Katanga (Judgment pursuant to article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014)[59] – [67].
[86] *Prosecutor v Mathieu Ngudjolo Chui (Judgment pursuant to article 74 of the Statute*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012) [115].
[87] The first Prosecution forensic investigation mission to Bogoro was conducted in March 2009 (for an explanation for the delay, see *Memoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments a charge ou relevant de la regle 77, de modi fication de la liste des elements a charge et de la liste des temoins a charge*, 15 July 2009, ICC-01/04-01/07-1305 [8]-[14].
[88] *The Prosecutor v Mathieu Ngudjolo Chui (Judgment pursuant to article 74 of the Statute*) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012) [117].
[89] Ibid [118].
[90] Ibid [119].

rape and sexual violence for which Katanga was acquitted, Brigid Inder of the Women's Initiatives for Gender Justice said that:

> From the early stages of this case, there were indications that some of the judges considered the evidence supporting the charges of rape and sexual slavery against Katanga to be insufficient. In the confirmation of charges decision, the sexual violence charges were the only crimes confirmed by a majority of judges and not by the full bench. This was an early and important indication that the evidence underpinning the charges of rape and sexual slavery would need to be reinforced at trial.[91]

Yet of concern is the fact that hardly anything was done by the OTP in this respect. Since the primary purpose of the ICC's confirmation of charges stage is to ascertain whether there are 'substantial grounds to believe' that an accused has committed a crime, it begs the question of how the OTP thought that the evidence regarding SGBV could then satisfy the threshold of 'beyond reasonable doubt.' To add insult to injury, after Germain Katanga withdrew his appeal, the OTP mysteriously withdrew theirs as well, despite initially arguing that the evidence of SGBV warranted a conviction.[92] This was in disappointing contrast to Bensouda's public support of victims of SGBV.

Overall, in most cases put forward by the OTP, a more thorough investigation of these issues would have resulted in a better interpretation of the facts and of the testimonies taken. After such negative assessments of the OTP's investigations in *Lubanga*, it would have been a positive step forward if lessons were learnt that did not cause the same frustration. Unfortunately, as seen in *Katanga* and *Ngudjolo Chui*, this was not the case.

As challenging as these investigative shortcomings were to establishing individual criminal responsibility for SGBV, a shift occurred with the case of *Bemba*.[93] Jean Pierre Bemba Gombo was unanimously convicted as a military commander on two counts of crimes against humanity including murder and rape and three counts of war crimes including murder, rape and pillaging.[94] Bemba was convicted in his capacity as President and Commander-in-Chief of the Movement for the Liberation of the Congo (MLC).[95] The crimes were committed by the MLC between 25 October 2002 and 15 March 2003 on the territory of the Central African Republic (CAR).[96] It is the first conviction before the ICC for crimes of sexual violence as well as the first conviction of an individual charged with command responsibility, under Article 28 of the Rome Statute. It is also the first case in which testimony from male victims of sexual violence was heard in support of the charge of rape.[97] On 21 June 2016 the Trial Chamber sentenced Bemba to 18 years' imprisonment for rape – the highest sentence issued to date by the ICC.

The Bemba case stands out from the rest because a gender-perspective was incorporated into the earlier stages of the investigation. Initially, the Prosecution sought a broad range of charges

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[91] Women's Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC – Acquittals for Sexual Violence and Use of Child Soldiers, *The Prosecutor vs. Germain Katanga*' (7 March 2014) <http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>.

[92] *Prosecutor v Germain Katanga (Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga)* (International Criminal Court, Office of the Prosecutor, Case No ICC-01/04-01/07-3498, 25 June 2014).

[93] *Prosecutor v Jean-Pierre Bemba Gombo (Judgment pursuant to article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016).

[94] Ibid [752].

[95] Ibid [172].

[96] Ibid [379]-[380].

[97] Ibid [496]-501].

of SGBV in the request for Bemba's arrest warrant including rape as a crime against humanity and a war crime; rape as torture as a crime against humanity and a war crime; outrages upon personal dignity as a war crime; other forms of sexual violence as a war crime and crime against humanity.[98] Recognising the importance of having sufficient evidence, the Bemba trial involved the largest number of witnesses for sexual violence in any ICC case to date, with 14 out of 40 Prosecution witnesses testifying about rape and other forms of sexual violence allegedly committed by the MLC under Bemba's command.[99] In contrast to the litany of errors that seemed to pervade the *Lubanga* case, *Bemba* is a milestone case for the ICC and victims of SGBV and their communities.

B Looking ahead

Promises and policy documents emphasising a commitment to effective investigations, particularly for SGBV, arose as a hopeful indication of the OTP putting article 54(1)(b) into practice. Fulfilling such promises has, until recently, proved difficult overall. In regards to the general issues that face victims of SGBV, having an even stronger connection between the OTP and the Victims and Witnesses Unit ('VWU') could ensure the all involved in proceedings are protected before, during and after a case is heard. There needs to be consistency in this regard as well, which will strengthen trust in the OTP, the corollary of which could be that a greater number of people come forward and give evidence.

Despite being consistently reminded by the judges of this, it is again suggested that the OTP continues to review its strategies for investigating SGBV, taking into account the existing jurisprudence as well as the Policy Paper on SGBV and its 2016-2018 Strategic Plan. Judges have made clear that the Prosecution must more adequately specify links between the facts and the elements of each crime alleged and, accordingly, it is important to present charges for distinct crimes of SGBV instead of having them fall under other crimes. Further, it is important to ensure that sufficient evidence from diverse sources, including witness testimony, is gathered and supported for all charges of SGBV from the very beginning.

It is further recommended that the OTP review and strengthen its practices for identifying and articulating the mode of liability to be charged, particularly in relation to SGBV. With the notable exception of *Bemba*, in the cases to have reached judgment stage (inclusive of charges for gender-based crimes) the accused have been either acquitted of all charges or of a limited number of charges. These include those of rape and sexual slavery based on the Chamber's determination that the evidence presented was not sufficient to prove the criminal liability of the accused beyond reasonable doubt. Better identification of the mode of liability will avoid the Regulation 55-related problems that arose in *Katanga*, protect the rights of the accused while ensuring that SGBV is given due attention.

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[98] All other charges except for rape as a war crime and crime against humanity were not confirmed as they were seen by the Pre-Trial Chamber to be 'cumulative' to the charge of rape: *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Case No ICC-01/05-01/08, 15 June 2009) [72]. See also the Women's Initiatives for Gender Justice's filings as amicus curiae on this matter: *Prosecutor v Jean-Pierre Bemba Gombo (Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 31 July 2009).

[99] Women's Initiatives for Gender Justice, 'Bemba Sentenced to 18 Years by the ICC: *The Prosecutor v Jean-Pierre Bemba Gombo*, Powerful sentencing decision on crimes of sexual violence' (21 June 2016) <http://4genderjustice.org/pub/Bemba-Sentencing-Statement.pdf>.

Finally, the OTP must continue to strengthen and refine its procedures for interviewing and managing local intermediaries in relation to their work with the Prosecution in locating and liaising with potential and actual witnesses. The Prosecution should also continue to review and strengthen its contacts with, and assessments of, the security and viability of trial witnesses, including continuing to actively investigate potential witness tampering or intimidation.

V CONCLUSION

The cases handled by the OTP to date have been fraught with difficulty: numerous cases have not advanced past the confirmation stage; the *Lubanga* judgment detailed extensively a host of prosecutorial problems; the *Gbagbo* case needed to be adjourned because the OTP had not provided sufficient evidence; the judgment in the *Ngudjolo Chui* case was a full acquittal; and Katanga, who was acquitted of SGBV-related crimes (which the OTP decided not to appeal) was convicted of other charges only after the judges themselves took an active role to change the mode of liability. Even the *Bemba* trial faced problems and only progressed after the mode of liability was changed upon the recommendation of the Pre-Trial Chamber itself.[100] Acknowledging the inherent difficulties of international criminal investigations as compared to domestic settings, for a long time it seemed that nothing had really changed since Luis Moreno-Ocampo completed his tenure at the ICC. This has been concerning not only for victims, witnesses and other participants in the criminal justice process, but also adversely affects the legacy the Court.

Despite these roadblocks and drawbacks the international community has indeed come far since the trials in Nuremberg, and the conviction of Bemba is evidence that the OTP has taken seriously the need to address SGBV in conflict. While this is to be commended, the task now is to ensure the jurisprudence of the Court is consistent. This involves ensuring that investigations are conducted so as to avoid any potential admissibility issues at trial and including a gender-perspective from the very beginning.

Investigative strategies should be continually monitored and improved to adequately allow for the admission of relevant evidence. This can be achieved by expanding the scope of investigations, corroborating evidence collected by NGOs and other organisations and incorporating a gender-perspective in investigations to ensure that the evidence collected adequately reflects the nature of the crimes committed in the area. Improvement in investigative practices will pave the way for a future where, pursuant to s 54(1)(b) of the Statute, effective investigations will help replace a culture of impunity with one of justice and accountability.

[100] *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Case No ICC-01/05-01/08, 15 June 2009) [341]-[342].